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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-217350 **DATE:** June 3, 1985
MATTER OF: A&C Building and Industrial Maintenance Corporation

DIGEST:

1. Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(a) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs.
2. An agency may not decide to forego soliciting an offer from the incumbent for the next contract period, and instead award a sole-source contract to another firm, based on its view that deficient past performance indicates the incumbent is not responsible, since a nonresponsibility determination should follow, not precede, a competition and, in the case of a small business like the incumbent, by law is subject to review by the Small Business Administration.

A&C Building and Industrial Maintenance Corporation (A&C) protests the award by the Department of Housing and Urban Development (HUD) of the contract on a sole-source basis to Eastern Services, Inc. (Eastern), to perform janitorial services at the HUD building in Washington, D.C. The contract is for a 6-month period, from December 1, 1984, to May 31, 1985, with options to extend for an additional 2-1/2 years.

We sustain the protest.

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Background

A&C was incumbent contractor for the services under a contract with the General Services Administration (GSA). On October 1, 1984, GSA transferred to HUD the operation and maintenance of the HUD Headquarters Building, including janitorial services; A&C's existing contract was to expire on November 30, 1984.

In anticipation of the expiration of the existing contract and the delegation of authority from GSA, HUD determined to secure further janitorial services through the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), which authorizes the SBA to enter into contracts with government departments and to arrange for performance by letting subcontracts to socially and economically disadvantaged business concerns. The SBA, on August 31, initially approved HUD's proceeding with preliminary negotiations for a section 8(a) subcontract and authorized HUD to negotiate directly with Eastern. Accordingly, on September 19, HUD issued a solicitation package to Eastern, which responded with a proposal for the work.

Because the contract value was estimated to be \$1,250,000, and Eastern's records had never been audited by a government agency, a comprehensive audit was scheduled to be conducted by the Defense Contract Audit Agency (DCAA). The existing contract with A&C was due to expire before completion of the audit, however, and HUD therefore proposed to enter into a letter contract with Eastern under the section 8(a) program, subject to SBA approval, pending completion of the audit and negotiation of a final 8(a) contract. On November 27, 3 days before the expiration of the existing contract, the SBA refused to accept the services for the 8(a) program because it had determined, in accordance with internal SBA policy, that the removal of the requirement from competition would have too adverse an impact on the incumbent contractor.

Since only 3 days remained until the expiration of the existing maintenance contract, HUD convened an emergency meeting of the HUD Procurement Review Board, which approved an emergency sole-source negotiated contract with Eastern. As originally contemplated, the contract with Eastern, executed on November 30, was to be for a period of 6 months with the option to extend the term of the contract for 2-1/2 more years. HUD since has requested reconsideration of SBA's decision not to enter into a section 8(a) contract.

Protest and Discussion

A&C contends that HUD has made an unjustified sole-source award at a higher price for allegedly lesser service requirements than under the contract A&C had with GSA. A&C argues that janitorial services are readily available from numerous companies that could be expected to compete for a government contract, and points out that A&C itself had offered to extend the existing contract on a month-to-month basis. Finally, A&C contends that, in any event, the public exigency did not justify entering into a sole-source contract that, with options, could extend for 3 years.

HUD responds that a sole-source award was justified by the public exigency since janitorial services must be uninterrupted and since HUD, notified only 3 days prior to the expiration of the existing contract that SBA would not approve an 8(a) contract, had insufficient time to request proposals from other possible offerors. HUD states that it did not simply extend A&C's contract, or seek a competitive offer from the firm to compare with Eastern's, because A&C's performance as the incumbent had been deteriorating steadily and was seriously deficient. HUD also states that the option provision originally contemplated will not be included in Eastern's contract; HUD advises that if SBA reverses its decision, a contract will be entered into with SBA under section 8(a), but if SBA affirms its decision, HUD will conduct a competitive procurement.

We do not believe that award to Eastern on a sole-source basis was proper.

We recognize that from August 31, when SBA initially approved HUD's request to negotiate with Eastern, until November 27, SBA gave no indication to HUD of any possibility that a contract under section 8(a) with Eastern as subcontractor would not be approved. Thus, when SBA notified HUD that it would not accept a section 8(a) contract, HUD legitimately needed to take quick action to assure its needs would be met, at least on an interim basis while it considered other procurement approaches. See International Business Services, Inc., B-209279.2, Feb. 8, 1983, 83-1 C.P.D. ¶ 142.

Nevertheless, government procurements generally must be conducted on a competitive basis to the maximum extent

practicable. Work System Design, Inc., B-213451, Aug. 27, 1984, 84-2 C.P.D. ¶ 226. A sole-source award therefore is justified where time is of the essence only if there is no other known source that could meet the agency's needs within the required time-frame. Id. Where there are other available sources, the agency must make reasonable efforts to generate competition by, for example, soliciting oral offers with short response times based on as complete a set of specifications as practical, or such other short-cuts as may reasonably be necessary under the circumstances. See Las Vegas Communications, Inc.--Reconsideration, B-195966.2, Oct. 28, 1980, 80-2 C.P.D. ¶ 323. Since a services contractor already in place, like A&C, logically should be viewed as a source available to continue the same or similar services, these principles suggest that HUD should have solicited an offer from A&C, on an expedited basis, to judge against Eastern's.

We also recognize that HUD was so dissatisfied with A&C's performance as the incumbent that the agency probably would not have accepted an offer from the firm even if it were lower in price than Eastern's. The decision that a firm is incapable of providing acceptable services based on its past performance, however, constitutes a negative determination of responsibility, which is supposed to follow, not precede, the firm's participation in the procurement, and which, in the case of a small business like A&C, must by law be referred to SBA for its review before the firm can be rejected. 15 U.S.C. § 637(b)(7) (1982). Thus, if HUD considered A&C nonresponsible, the agency should have so concluded after receiving the firm's offer, and then solicited SBA input. Accordingly, it was improper for HUD not to include the protester in an expedited competition with Eastern based on what in effect constituted a prospective determination that A&C was nonresponsible.

As to the propriety of the protested option provisions in Eastern's 6-month contract, we understand that HUD has not actually deleted the option provisions, but apparently simply does not intend to extend the contract. (The agency anticipates that SBA will approve a new 8(a) contract award.) On that basis, we dismiss the protest on this issue as academic. Nevertheless, we point out that it would, in our view, be incongruous for a sole-source contract award based on the public exigency to contain option provisions like those here. See NCR Corp.; General Systems Corp., B-208143, et al., Apr. 14, 1983, 83-1 C.P.D. ¶ 403; International Business Services, Inc., B-209279.2, supra.

The protest against the sole-source award is sustained. Since the 6-month period is practically over, however, and since the contract will not be extended, no remedial action is practicable.

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